Comments

Nicaragua v. United States: Pre-Seisin Reciprocity and the Race to The Hague

I. Introduction

On April 9, 1984, the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the International Court of Justice (I.C.J.) an application instituting proceedings against the United States of America in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua.[1] Nicaragua asserted that declarations made by the parties accepting the compulsory jurisdiction of the Court pursuant to Article 36, paragraph 2,[2] of the Statute of the Court,—a declaration made by the United States of America on August 14, 1946,[3] and a declaration made by the Republic of Nicaragua on September 29, 1929,[4] recognizing the compulsory jurisdiction of the Permanent Court of Interna-

1. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 395 (Jurisdiction and Admissibility, Judgment of Nov. 26).

2. S. Rosenne, Documents on the International Court of Justice 77 (2d ed. 1979). Nicaragua also relied on paragraph 5 of Article 36 of the Statute of the present Court, which provides:

> Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

3. *Id.* at 415. The U.S. declaration provides:

> I, Harry S. Truman, President of the United States of America, declare on behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), that the United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning
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> a. the interpretation of a treaty;
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> b. any question of international law;
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> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
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> d. the nature or extent of the reparation to be made for the breach of an international obligation;
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> *Provided*, that this declaration shall not apply to
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> a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or
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> b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or
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> c. disputes arising under a multilateral treaty, unless (1) all the Parties to the treaty affected by the decision are also Parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction; and
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> *Provided further*, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.
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> Done at Washington this fourteenth day of August 1946.
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> (*signed*)
> Harry S. Truman

4. *Id.* at 392. Nicaragua's declaration states:

> On behalf of the Republic of Nicaragua, I recognize as compulsory, unconditionally the jurisdiction of the Permanent Court of International Justice.
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> Geneva, 24 September 1929
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> (*signed*) T. F. Medina

The footnote to the declaration provides:

> According to a telegram dated 29 November 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the *Permanent Court of International Justice* (16 December 1920),

tional Justice[5]—provided the Court a proper foundation upon which to exercise jurisdiction over the issues in question.[6]

The United States had anticipated Nicaragua's application. On April 6, 1984, three days prior to the filing of the application, the United States deposited a letter with the Secretary-General of the United Nations[7] announcing a partial and temporary termination of its 1946 declaration. Effective immediately and for two years thereafter, the United States would no longer accept the Court's jurisdiction over disputes arising out of or relating to events in Central America.

After Nicaragua filed its application, the United States advanced several challenges[8] to the Court's ability to entertain the case concerning *Military and Paramilitary Activities in and against Nicaragua*.[9] Specifically, the United States attempt to disregard the six month notice clause presented jurisdictional issues of first impression, which directly implicated the Court's continued effectiveness and credibility.

In its November 26, 1984, decision on the issue of jurisdiction,[10] the International Court of Justice held that although the United States retained the right to terminate the 1946 declaration of acceptance, its formal statement that any change would take effect only after six months from the date of notice nevertheless created an inescapable obligation toward other states which had accepted the Court's compulsory jurisdiction.[11] The Court firmly acknowledged the binding nature of the obligations assumed by the parties pursuant to their acceptance of the optional clause system,[12] and invalidated the United States April 6, 1984, maneuver.[13]

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and the instrument of ratification was to follow. It does not appear, however, that the instrument of ratification was ever received by the League of Nations.

Id. at 291.

5. *See generally* R.P. ANAND, COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (1961).

6. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 395 (Jurisdiction and Admissibility, Judgment of Nov. 26).

7. The letter was received by the Executive Office of the Secretary-General of the United Nations at 5:55 p.m. on Friday, April 6, 1984 and provided:

> I have the honor on behalf of the Government of the United States of America to refer to the Declaration of Government of August 26, 1946, concerning the acceptance by the United States of America of the compulsory jurisdiction of the International Court of Justice, and state that the aforesaid Declaration shall not apply to disputes with any Central American state or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.
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> Notwithstanding the terms of the aforesaid Declaration, this *proviso* shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political economic and security problems of Central America.
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> (*signed*) George P. Shultz
> Secretary of State of the
> United States of America.
>
> 6 April 1984

Memorial of Nicaragua (Nicar. v. U.S.), 1984 I.C.J. Pleadings (Letter of Secretary of State, April 6, 1984) App. II, Exhibit B (Memorial dated June 30, 1984) [hereinafter cited as Memorial of Nicaragua]; *see infra* text accompanying notes 69–71.

8. *See infra* text accompanying notes 88–89.

9. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Jurisdiction and Admissibility, Judgment of Nov. 26).

10. *Id.*; *see infra* text accompanying note 92.

11. *Id.* at 419.

12. *Id.* at 418. *See infra* text accompanying notes 123–49.

13. *Id.* at 421. *See infra* text accompanying notes 123–49.

Following a brief survey of concepts integral to an understanding of the optional clause regime, and a procedural history of the case, this Note will consider the issues raised by the 1984 notification: the nature of the obligations undertaken by sovereign states accepting the compulsory jurisdiction of the Court[14] and the applicability of the reciprocity doctrine[15] to the time limits contained in the declarations.

II. JURISDICTION IN THE I.C.J.

In the international sphere jurisdictional questions are duly recognized and treated as more than mere technical issues.[16] States frequently attempt to avoid the jurisdiction of the Court even though consent to adjudicate has been given generally and in advance under an optional clause declaration. In those cases, the Court must interpret the declaration and determine just what and how much is covered by the consent given.[17]

> [A] distinguished authority has called jurisdictional questions "the core of the work of the Court", and again: "The complexity of the issue of jurisdiction, and the far-reaching ramifications of the results of a decision . . . on a question of jurisdiction, are reflected in the prominent place which these questions occupy in the general practice of the Court. . . . The question whether and to what extent the Court has jurisdiction is frequently of no less, if not of more, political importance than the decision on the merits.[18]

Sovereign states, the subjects of international law, can not be compelled to submit their disputes to adjudication. Therefore, the declarations of consent to be bound to the jurisdiction of the International Court of Justice represent unilateral commitments fundamental to the effectiveness of the international legal order. The Statute of the I.C.J., specifically the optional clause provision of Article 36, paragraph 2, offers a framework for states to enter into binding legal obligations vis-a-vis other similarly situated states and on certain conditions.

A. *The Consensual Basis of Jurisdiction*

The jurisdiction of international tribunals is derived solely from the will of the parties. Accordingly, the principle that no one is entitled to be the judge in his own case, is not observed in international law.[19] Concepts of sovereignty,[20] reflected in Article 36 of the Court's Statute, establish that consent of the states is the essential basis for the Court's jurisdiction over parties to a dispute. Paragraph 1 of Article 36 of the Statute reads, "The jurisdiction of the Court comprises all cases which the parties refer to it, and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."[21] The Court has affirmed this

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14. *See infra* text accompanying notes 123–49.

15. *See infra* text accompanying notes 49–66.

16. H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 350 (1958).

17. Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–54: Questions of Jurisdiction Competence and Procedure*, 34 BRIT. Y.B. INT'L L. 1, 86 (1958).

18. *Id.* at 10 (quoting S. ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 249, 337–38 (1957)).

19. H. LAUTERPACHT, *supra* note 16, at 338.

20. S. ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 260 (1957).

21. S. ROSENNE, *supra* note 2, at 77.

principle in numerous cases determining whether, under the circumstances, the consent of both parties had been given to permit the exercise of the jurisdiction of the Court.[22] In the *Anglo-Iranian Oil Co.*[23] case the Court stressed "the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the parties. Unless the parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction."[24] However, acceptance of jurisdiction contemporary and ad hoc to the actual dispute is not necessary.[25] A state's consent may be given generally and in advance pursuant to an optional clause declaration.

B. *Jurisdiction Under the Optional Clause*

During the formation of both the Permanent Court of International Justice[26] and the International Court of Justice, the Great Powers made it clear that they were unwilling to commit themselves in advance to an acceptance of compulsory jurisdiction over all parties to the Court's Statute and for all legal disputes.[27] The optional clause, Article 36, paragraph 2, of the Statute of the Court, represents a compromise adopted at the First Assembly of the League of Nations to obtain the consent of states to obligatory judicial settlement.[28]

The optional clause was a compromise intended to give each party to the Statute the option, at the time of signing or ratifying the Statute or at any time afterwards, to make a unilateral declaration by which, on the basis of reciprocity,[29] it recognized the Court's compulsory jurisdiction. The Statute explicitly grants sovereign states

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22. *See* Ambatielos (Greece v. U.K.), 1953 I.C.J. 10 (Merits: obligation to arbitrate, Judgment of May 19); Ambatielos (Greece v. U.K.), 1952 I.C.J. 28 (Preliminary Objection, Judgment of July 1); Interpretation of Peace Treaties (Bulg., Hung. and Rom.), 1950 I.C.J. 65, 71 (Advisory Opinion of March 30); Rights of Minorities in Upper Silesia (Ger. v. Pol.), 1928 P.C.I.J., ser. A, No. 12, at 22 (Judgment of Apr. 26); Eastern Carelia (Fin. v. U.S.S.R.), 1923 P.C.I.J., ser. B, No. 5, at 6–7 (Advisory Opinion of July 23).

In the first phase of the *Nottebohm* case, the court said:

> Article 36 determines the cases in respect of which the Court shall have jurisdiction. It indicates that the Court can deal with cases referred to it by agreement of the parties; and it determines the field of application of what has come to be called the compulsory jurisdiction of the Court.

Nottebohm (Liechtenstein v. Guat.), 1953 I.C.J. 111, 122 (Preliminary Objection, Judgment of Nov. 18).

23. Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93 (Jurisdiction, Judgment of July 22).

24. *Id.* at 103. In the words of one I.C.J. judge, "One cannot dispute the fact that the jurisdiction of the Court is a limited one. Acceptance of jurisdiction by States is purely a voluntary act on their part . . . ." *Id.* at 139 (Jurisdiction, Judgment of July 22) (Hackworth, J., dissenting). For the individual opinions of other judges, see *id.* at 145 (Read, J., dissenting), *Id.* at 116 (McNair, Pres., Indiv. Opin.); Anglo-Iranian Oil Co. (U.K. v. Iran), 1951 I.C.J. 89, 96 (Order of July 5) (Winiarski, J. and Badawi, J., dissenting); Chorzow Factory (Ger. v. Pol.), 1927 P.C.I.J., ser. A, No. 8, at 39 (Jurisdiction, Judgment of July 26) (Ehrlich, J., dissenting).

25. Fitzmaurice, *supra* note 17, at 68 n.4. On the other hand, the unilateral, voluntary act of accepting the Court's jurisdiction pursuant to the optional clause notifies the world that the declarant state is prepared to submit certain classes of disputes to the Court's judicial scrutiny. *Id.* at 140. Professor Anthony D'Amato has highlighted the offensive potential of accepting the Court's compulsory jurisdiction, and urges that "every state [that] professes to act legally on the international plane . . . should join the compulsory jurisdiction of the World Court." D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L L. 385, 386 (1985).

26. For an in-depth treatment of the transition from the P.C.I.J. to the I.C.J. see R.P. ANAND, *supra* note 5, ch. 2; S. ROSENNE, *supra* note 20, at 302.

27. *See* Waldock, *Decline of the Optional Clause*, 32 BRIT. Y.B. INT'L L. 244 (1955).

28. The optional clause was adopted at the San Francisco Conference of 1945 in terms which are identical in all material respects to the compulsory jurisdiction clause of the P.C.I.J. *See generally* R.P. ANAND, *supra* note 5.

29. *See infra* text accompanying notes 49–66.

within the optional clause system the power to define the classes of legal disputes to which their declaration applies.[30] Paragraph 2 of Article 36 of the Statute provides:

> The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
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> a. the interpretation of a treaty;
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> b. any question of international law;
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> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
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> d. the nature or extent of the reparation to be made for the breach of an international obligation.[31]

Optional clause jurisdiction exists when both parties have made declarations pursuant to Article 36, paragraph 2, in terms that cover the dispute brought before the Court. While each of these declarations is by itself a unilateral act[32] and not a treaty resulting from negotiations,[33] the coincidence of two declarations creates a consensual bond establishing contractual relations between the parties.[34] By these declarations, jurisdiction is conferred on the Court to the extent that the two declarations coincide.[35]

Sir Arnold McNair's individual opinion in the *Anglo-Iranian Oil Co.*[36] case serves as a concise overview of the system of compulsory jurisdiction. In that case, McNair observed:

> Under the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice no State was under any obligation to accept the jurisdiction of that Court. However, Article 36, paragraph 2, of the Statute afforded to States an opportunity of doing so by means of a voluntary act. That paragraph . . . was in the nature of a standing invitation made on behalf of the Court to Members of the League of Nations to accept as compulsory, on the basis of reciprocity, the whole or any part of the jurisdiction of the Court as therein defined. It should be noted that the machinery provided by that paragraph is that of "contracting in", not of "contracting out". A State, being free either to make a Declaration or not, is entitled, if it decides to make one, to limit the scope of its Declaration in any way it chooses, subject always to reciprocity. Another State seeking to found the jurisdiction of the Court upon it must shew that the Declarations of both States concur in comprising the dispute in question within their scope.[37]

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30. Waldock, *supra* note 27, at 244.

31. S. ROSENNE, *supra* note 2, at 77.

32. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1964 I.C.J. 6, 29 (Preliminary Objections, Judgment of July 24); Phosphates in Morocco (Italy v. Fr.), 1938 P.C.I.J., ser. A/B, No. 74, at 23 (Judgment of June 14).

33. Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93, 105 (Jurisdiction, Judgment of July 22).

34. Right of Passage over Indian Territory (Port. v. India), 1957 I.C.J. 125, 146 (Preliminary Objections, Judgment of Nov. 26).

35. Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93, 103 (Jurisdiction, Judgment of July 22).

36. *Id.*

37. *Id.* at 116. (McNair, J., Sep. Opin.).

C. *Reservations*

One of the most difficult problems related to declarations under the optional clause is the question of reservations from compulsory jurisdiction. Article 36, paragraph 3, provides that the declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states.[38] The declarations may also be made for a limited or an indefinite period.[39]

Article 36 of the Statute of the Permanent Court of International Justice did not expressly provide for reservations. It appeared from the text of Article 36 that states would specify in their declarations which of the categories of legal disputes enumerated in Article 36 would come within the scope of the declarant's acceptance.[40] However, a long and unbroken practice has rejected that interpretation[41] and, despite the absence of textual authority, states almost immediately began qualifying their declarations with a wide range of reservations.[42] Commentators have typically asserted that the Statute of the Permanent Court of International Justice provided an inherent right to qualify an acceptance of the Court's jurisdiction by limitations, reservations, and conditions.[43] Thus, by 1945 "[s]tate practice had declared itself firmly in favour of the right of attaching to declarations what are now called reservations, both of a kind mentioned in the Statute, and of other kinds."[44]

The report of the Rapporteur of Committee IV/1[45] at the initial Conference at San Francisco emphasized the freedom of a state accepting compulsory jurisdiction under the optional clause to except large categories of disputes from its acceptance:[46]

> The question of reservations calls for an explanation. As is well known, the article has consistently been interpreted in the past as allowing States accepting the jurisdiction of the Court to subject their declarations to reservations. The sub-committee has considered such interpretation as being henceforth established. It has, therefore, been considered unnecessary to modify [Article 36] paragraph 3 in order to make express reference to the right of the States to make such reservations.[47]

The right to unilaterally append substantive exceptions to an acceptance of the optional clause evolved to reconcile the political realities of state sovereignty with the promotion of the compulsory jurisdiction of the Court.[48] The rights of reservation

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38. S. ROSENNE, *supra* note 2, at 77.

39. Only ten declarations contain no time limit and are therefore classified as "indefinite." 1981–1982 I.C.J.Y.B. 64–93 (1982) (Colombia, Dominican Republic, Egypt, Haiti, Honduras, Nicaragua, Nigeria, Panama, Uganda, Uruguay).

40. Hambro, *Some Observations on the Compulsory Jurisdiction of the International Court of Justice*, 76 RECUEIL DES COURS 125, 183 (1950 I).

41. *Id.*

42. The League of Nations encouraged this process. *See* Records of Fifth Assembly Committees, League of Nations Docs., III, at 189–98; *Id. Plenary* at 225 (Resolution of October 2, 1924); *Records of Ninth Assembly, Plenary* at 183 (Resolution of September 26, 1928); *see also* S. ROSENNE, *supra* note 20, at 310–11.

43. *See, e.g.*, Crawford, *The Legal Effect of Reservations to the Jurisdiction of the International Court*, 50 BRIT. Y.B. INT'L L. 63, 79 (1979); Hambro, *supra* note 40, at 183.

44. S. ROSENNE, *supra* note 20, at 311; Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 46 (Judgment of July 6) (Lauterpacht, J., Sep. Opin.).

45. 13 U.N.C.I.O. Docs. 391–92 (1945).

46. Waldock, *supra* note 27, at 249.

47. 13 U.N.C.I.O. Docs. 391–92.

48. Memorial of United States of America (Nicar. v. U.S.), 1984 I.C.J. Pleadings 218–19 (Memorial dated August 17, 1984) [hereinafter cited as Memorial of United States].

enumerated in Article 36, paragraph 3, highlight the tension between the desire to promote use of the Court and the realization that the adherence of sovereign states to the terms of their own declarations may depend upon the flexibility afforded them in fashioning their acceptances in light of changing conditions.

The other condition mentioned in Article 36, paragraph 3, that declarations may be made "for a certain time" has been interpreted by states to grant complete freedom to limit the duration of their declarations. The issue of duration in conjunction with the inherent right of reciprocity occupied a pivotal role in the Court's resolution of the disputes over jurisdiction between Nicaragua and the United States.

D. *Reciprocity*

The doctrine of reciprocity allows a state to invoke certain limitations and reservations not listed in its own declaration but included in an opposing state's declaration of acceptance of compulsory jurisdiction. Reciprocity is an absolute condition[49] inherent in the optional clause itself under which a declaration may be made accepting compulsory jurisdiction "in relation to any other state *accepting the same obligation.*"[50]

> Taken literally, the words "accepting the same obligation" might seem to imply that one State is bound to another under the Optional Clause only when the obligations assumed in their respective declarations are exactly, or at least broadly, the same. But such an interpretation of the words would have been highly prejudicial to the development of compulsory jurisdiction. . . . The effect would have been to divide the States adhering to the Optional Clause into small groups whose members had made the same or similar declarations . . . .
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> . . . The words have not, however, been treated as laying down a condition that *exactly, or even broadly the same obligation of compulsory jurisdiction must have been accepted by each State*. The words "in relation to any other state accepting the same obligation" have rather been interpreted as requiring that there shall be complete reciprocity in the operation of compulsory jurisdiction under the Optional Clause *as between two States which have accepted the obligation in different terms*. This interpretation emerges very clearly from the attitude of States before the Court and from the jurisprudence of the Court.[52]

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49. Hambro, *supra* note 40, at 184.

50. S. ROSENNE, *supra* note 2, at 77 (emphasis added). Paragraph 3 "simply authorizes states to accept compulsory jurisdiction under the Optional Clause for limited periods, and to make their liability to jurisdiction conditional on compulsory jurisdiction having been also accepted by a particular number of other States. . . . This paragraph does not relate to 'reciprocity.'" Waldock, *supra* note 27, at 255. Reciprocity is instead a basic constitutional provision of the Statute applying to every declaration. *Id.* Thus, whether a declaration contains the formal statement that it is made "on condition of reciprocity" or the statement that it is made "without condition," the condition of reciprocity emanates from the language of Article 36, paragraph 2. Speaking on this subject Professor Hudson states:

> Every declaration made under paragraph 2 of Article 36, whether it is made by signature of the optional clause or otherwise, has this [reciprocal] characteristic impressed upon it. It is not a reservation made by the declarant; it is a limitation in the very nature of the declaration which operates under or is made "in conformity with" paragraph 2 of Article 36.

M.O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 453 (1925).

52. Waldock, *supra* note 27, at 255–58; *see* Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), 1939 P.C.I.J., ser. A/B, No. 77, at 81 (Judgment of April 4); Phosphates in Morocco (Italy v. Fr.), 1938 P.C.I.J., ser. A/B, No. 74, at 22 (Judgment of June 14).

Jurisdiction under the optional clause is conferred on the Court *only to the extent to which the two declarations coincide in conferring it.*[52]

Like the right to reserve limitations on the scope of a state's obligation to adjudicate in the I.C.J., the doctrine of reciprocity is a product of political reality: sovereign states will refuse to be bound vis-a-vis another state that has not similarly subjected itself to the jurisdiction of the Court. This common ground principle embodied in the reciprocity doctrine guarantees that the common will of the parties governs the extent of the Court's jurisdiction. Thus, jurisdiction in a particular case exists only within the narrower limits established by the state which placed the broader reservations on its acceptance of compulsory jurisdiction.[53]

Two distinct levels of obligation attach to states that are parties to the optional clause system. At the first level, which is attained immediately upon proper filing of a declaration with the Registry, a state enters into a consensual relationship with other states similarly accepting optional clause jurisdiction. The obligations undertaken are "not irrevocably fixed at the time when declarations are deposited."[54] The second level arises upon the filing of an application linking two states whose declarations are currently in force. Thus, the substance of the conditions and limitations contained in a state's declaration need to be considered only upon the filing of an application with the Court. At that moment, reciprocity operates to equalize the extent of the obligations which will bind the parties, and to define the parameters of the Court's jurisdiction. To invoke the Court's compulsory jurisdiction, the substance of an application must fall within the common ground staked out by the rule of reciprocity.

The key event in determining the jurisdiction of the Court is the date the Court is seised of a case by the filing of an application, this being the date when all the elements necessary to give the Court jurisdiction are present.[55] The rule in the *Nottebohm*[56] case mandates that no modifications or amendments subsequent to the filing of an application will divest the Court of jurisdiction properly established at the date of seisin.[57] Reciprocity does not alter a declaration, it merely acts as a sliding scale to adjust the scope of the commitments of both parties for the purpose of determining whether the subject matter of the dispute falls within the zone of mutual consent to adjudicate.

The Permanent Court of International Justice was first directly confronted with the reciprocity issue in the *Electricity Company of Sofia and Bulgaria* case.[58] The declaration of Belgium, the plaintiff state, contained a limitation *ratione temporis*. However, the defendant state, Bulgaria, had deposited an unconditional acceptance of the optional clause. Bulgaria was permitted to avoid the Court's jurisdiction

52. Waldock, *supra* note 27, at 261; Fitzmaurice, *supra* note 17, at 75.

53. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 23–24 (Judgment of July 6); Briggs, Nicaragua v. United States: *Jurisdiction and Admissibility*, 79 AM. J. INT'L L. 373, 376 (1985); *see* Fitzmaurice, *supra* note 17, at 76.

54. Briggs, *supra* note 53, at 376.

55. South West Africa (Ethiopia v. S. Afr.), 1962 I.C.J. 319, 499 (Preliminary Objections, Judgment of Dec. 21) (Spender, J., and Fitzmaurice, J., Jt. Dissenting Opin.).

56. Nottebohm (Liechtenstein v. Guat.), 1953 I.C.J. 111 (Preliminary Objection, Judgment of Nov. 18).

57. *Id.* at 122.

58. Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), 1939 P.C.I.J., ser. A/B, No. 77 (Preliminary Objection, Judgment of Apr. 4).

because of the limitation contained in the Belgian declaration. The Court observed that:

> Although this limitation does not appear in the Bulgarian Government's own declaration, it is common ground that, in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36 of the Court's Statute and repeated in the Bulgarian declaration, it is applicable between the parties.[59]

In the *Certain Norwegian Loans* case,[60] France instituted proceedings in a dispute with Norway concerning the payment of Norwegian loans issued in France. The French declaration accepting the compulsory jurisdiction of the Court contained the following reservation: "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."[61] The Norwegian Government successfully invoked the French reservation, claiming that "the Norwegian Government cannot be bound, vis-a-vis the French Government, by undertakings which are either broader or stricter than those given by the latter Government."[62] The jurisdiction of the Court depended on the unilateral declarations of the two states, both of which were subject to the condition of reciprocity. "A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within the narrower limits indicated by the French reservation."[63] As a result, Norway was entitled to exempt disputes defined by Norway as within its national jurisdiction from the compulsory jurisdiction of the Court.[64]

These typical uses of reciprocity are well accepted and approved by the international community. However, states' limitations on the length of their declarations' validity and the manner and notice period they have prescribed for themselves concerning the right to modify, amend, or terminate their declarations raise awkward questions of reciprocity.

The *Nicaragua* case questions whether the parties are entitled to invoke and rely upon manner and notice period reservations contained in the declarations of *potential adversaries* in order to make changes in their *own* declaration.[65]

The previous discussion makes it clear that the reciprocity principle does not function to define the common jurisdictional ground until an application is filed; no jurisdictional commitments are altered under the rule of reciprocity *until* an application is filed. Under the rule in *Nottebohm*,[66] any substantive changes in a declaration that might have been effected pursuant to a durational condition in that state's

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59. *Id.* at 81.
60. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9 (Judgment of July 6).
61. *Id.* at 23.
62. *Id.*
63. *Id.*
64. *Id.* at 24.
65. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 420 (Jurisdiction and Admissibility, Judgment of Nov. 26); *see supra* text accompanying notes 52–57.
66. Nottebohm (Liechtenstein v. Guat.), 1953 I.C.J. 111 (Preliminary Objection, Judgment of Nov. 18).

declaration are *irrelevant* if made *after* the filing of an application. Therefore, *once an application has been filed* a state party can neither invoke its own reserved right to alter its commitment, nor can it invoke any such rights reserved in an opponent's declaration in the hope of avoiding jurisdiction in that particular case.

Despite the clarity and consistency of these conclusions, the United States argued that it was entitled, on the basis of reciprocity, to benefit from durational conditions supposedly contained in the Nicaraguan declaration *prior to* the date on which Nicaragua filed its application.[67] However, reciprocity of temporal limitations *prior to* the seisin of the Court proves untenable; in the *Nicaragua* case the I.C.J. properly rejected the United States argument for pre-seisin reciprocity.

III. Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*)

On April 8, 1984, the United States State Department publicly announced that it would not accept the jurisdiction of the International Court of Justice in disputes involving Central America for the next two years.[68] The unexpected and unprecedented move was a hasty reaction to information that Nicaragua was considering bringing charges against the United States concerning American financial support and military supervision of anti-Government rebel activities in and against Nicaragua.[69] These activities included mining operations that damaged foreign commercial ships in and around several Nicaraguan harbors.[70] Only one week earlier, the United States had vetoed a Security Council resolution calling for a halt to these activities.[71] On April 6, 1984, in the wake of mounting public disapproval of U.S. actions,[72] the State Department issued a communication to the United Nations Secretary-General, referring to the United States 1946 declaration and stating that:

> [T]he aforesaid Declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.
>
> Notwithstanding the terms of the aforesaid declaration, this *proviso* shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America.[73]

The Departmental Statement of April 8, 1984, provided the American public with the following explanation:

> This step has been taken to preclude the Courts' being misused to divert attention from the real issues in the region and to disrupt the ongoing regional peace process by

67. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 416–17 (Jurisdiction and Admissibility, Judgment of Nov. 26).

68. Memorial of Nicaragua, *supra* note 7, at App. II, Exhibit C; *see infra* text accompanying note 74.

69. Gwertzman, *U.S. Voids Role of World Court on Latin Policy*, N.Y. Times, Apr. 8, 1984, at A1, col. 1.

70. Rogers, *Reagan Snubs World Court Over Nicaragua*, Wall St. J., Apr. 6, 1984, at 1, col. 1.

71. Gwertzman, *supra* note 69.

72. Rogers, *supra* note 70.

73. Memorial of Nicaragua, *supra* note 7, at App. II, Exhibit B.

protracted litigation of claims and counter-claims. . . . We do not wish to see the Court abused as a forum for furthering a propaganda campaign.[74]

On April 9, 1984, the Republic of Nicaragua filed an application which recounted a series of events spanning the time period from March 1981 to the present day. In particular, Nicaragua accused the United States of violating its international legal obligations "by organizing, training, supporting and directing a 10,000 man mercenary army operating against Nicaragua from bases in Honduras; by mining Nicaraguan ports, invading its airspace and attacking major economic instal lations . . . and by seeking to overthrow the Government of Nicaragua . . . ."[75] These activities, Nicaragua claimed, had caused it grievous harm by violating its sovereignty, territorial integrity, and political independence, the most fundamental and universally accepted principles of international law.[76]

At the time the application was filed, the Republic of Nicaragua also filed a request for the Court's recommendation of provisional measures under Article 41 of the Statute.[77] In view of the urgent nature of Nicaragua's request, the Court, by Order of May 10, 1984,[78] directed the parties and other states in the region to take certain provisional measures. Although the special provisions in Article 41[79] enable indication of such provisional measures, the Court further was required to derive its jurisdiction to deal with the merits of the case from Article 36.[80]

In claiming the Court had jurisdiction, Nicaragua relied on the United States acceptance of jurisdiction in its declaration dated August 14, 1946.[81] To rely on the optional clause as the basis for the Court's jurisdiction under Article 36, Nicaragua claimed it was a "State accepting the same obligation."[82] To this end, Nicaragua relied on its own declaration, dated September 24, 1929, which purports to "recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice."[83] The Nicaraguan declaration is unconditional, containing neither time limits nor substantive reservations. The United States declaration,

74. *Id.* at App. II, Exhibit C.

75. Memorial of Nicaragua, *supra* note 7, at ¶ 1.

76. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169, 170 (Provisional Measures Order of May 10).

77. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 395 (Jurisdiction and Admissibility, Judgment of Nov. 26).

78. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (Provisional Measures Order of May 10).

79. S. ROSENNE, *supra* note 2, at 81. Article 41 provides:

1) The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2) Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

80. *See* Anglo-Iranian Co. (U.K. v. Iran), 1952 I.C.J. 93 (Jurisdiction, Judgment of July 22).

81. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 415 (Jurisdiction and Admissibility, Judgment of Nov. 26); *see supra* note 3.

82. *See supra* text accompanying note 66.

83. 1982–1983 I.C.J.Y.B. 82 (1983); *see supra* note 4.

however, was qualified by three substantive reservations[84] and could be terminated only six months after notice was given to that effect.[85]

Because the interpretation and interaction of the United States and Nicaragua's declarations before and after the filing of the application on April 9, 1984, were issues determinative of jurisdiction, the Court required these two nations to submit memorials solely addressed to the question of jurisdiction.[86]

Both parties advanced several arguments on the issues of jurisdiction and admissibility. Nicaragua's memorial argued that the declarations of the parties, both of which were in force as valid and binding acceptances of the Court's compulsory jurisdiction on the date the application was filed, and both of which embraced the legal dispute presented in the application fully established the Court's jurisdiction.[87]

The United States claimed that Nicaragua itself never effectively accepted the Court's jurisdiction.[88] The United States also relied on the April 6, 1984, notification and argued that the claims presented were not within the scope of its modified acceptance of the Court's jurisdiction.[89]

The Court found by a vote of 11–5 that the Nicaraguan Declaration of 1929 constituted a valid and binding declaration of acceptance. Because it is extremely unlikely that such an issue will arise again, the more significant jurisdictional question concerned the United States 1984 letter of notification: whether the United States was

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84. The U.S. Declaration of 1946 explicitly exempts three categories of dispute from the scope of its acceptance of compulsory jurisdiction:

> a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or
>
> b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or
>
> c. disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction. . . .

1981–1982 I.C.J.Y.B. 92 (1982).

85. The United States manner and notice reservation states "that [the 1946] declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration." *Id.*

86. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 488 (Interim Protection Order of May 14). By order of May 14, 1984, the Court directed Nicaragua to file with the Court by June 3, 1984, a Memorial addressing those issues and directed that the United States file a Counter-memorial on the same issues by August 17, 1984. Oral arguments were heard in The Hague between October 8–18, 1984.

87. Memorial of Nicaragua, *supra* note 7, at 2–3. In addition, Nicaragua asserted that the claims presented fell within the scope of the jurisdiction conferred on the Court by the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, executed on January 21, 1956. *Id.* at 85–90. 9 U.S.T. 448; T.I.A.S. No. 4024. Furthermore, Nicaragua denied that political considerations or the Contadora regional peace process barred the Court from adjudicating the legal claims presented. Memorial of Nicaragua, *supra* note 7, at 96–105.

88. Memorial of United States, *supra* note 48, at 200.

89. *Id.* The United States denied the admissibility of Nicaragua's claims on three grounds: (1) Nicaragua's claims implicate the rights of indispensible parties, (2) Nicaragua is already committed to alternative modes of peaceful resolution and (3) the determinations to be made have been entrusted by the United Nations Charter to the United Nations Security Council. *Id.* at 3, 270–343. However,

> Article 33 of the United Nations Charter clearly specifies that the Court may deal with the legal aspects of political controversies, as it did in the hostage and peacekeeping-expenses case. . . . [The U.S.] has repeatedly and properly argued that national claims of self-defense raise issues of international law that can be reviewed by international bodies.

Gardner, *It Was Wrong to Duck the World Court*, Wall St. J., Feb. 22, 1985, at 26, col. 4.

free to disregard the clause of six month notice which, freely and by its own choice, it had appended to its 1946 declaration.[90]

Nicaragua v. United States was a case of first impression on many of the jurisdictional issues raised.[91] On November 26, 1984, the Court decided in favor of both the jurisdiction and admissibility of the issues raised in Nicaragua's application.[92] The Court's discussion of the nature of the obligations undertaken by the filing of a declaration, the nature of the relationship established upon the filing of an application between similarly situated states, and the relationship of temporal limitations with the statutory right of reciprocity, will have far-reaching consequences for the development of the Court's compulsory jurisdiction. The following sections of this Note analyze the Court's resolution of these issues and the future implications of both the majority and separate opinions.

A. *State Practice—The Reality of the Right to Modify*

The United States contended that the 1984 letter "effected a valid modification temporarily suspending the consent of the United States to the adjudication of [Nicaragua's] claims."[93] Nicaragua conceded that if this contention were true, the Court would be without jurisdiction to entertain the proceedings, at least under Article 36 of the Statute.[94] However, Nicaragua maintained that the United States Declaration of 1946 was subject to the proviso that six months notice was required to terminate it, and contended that:

> First, the principles of the law of treaties apply generally to the modification and termination of declarations of acceptance of jurisdiction under the optional clause. Secondly, a declaration which lays down express conditions for termination or modification cannot be terminated or modified except on those conditions or on some other ground recognized in the law of treaties. Thirdly, the conditions laid down in respect of termination or modification must also be compatible with the Statute of the Court.

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90. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 419 (Jurisdiction and Admissibility, Judgment of Nov. 26).

91. Memorial of United States, *supra* note 48, at 3–4.

92. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 442 (Jurisdiction and Admissibility, Judgment of Nov. 26). The Court found, by a vote of 11 to 5, that Nicaragua had accepted the Court's compulsory jurisdiction and that the United States also had acceded to that jurisdiction for the purposes of this case. By a vote of 14 to 2, the Court found that it had jurisdiction to consider whether any of Nicaragua's claims violate provisions of the 1956 bilateral Friendship, Commerce and Navigation Treaty. Based on these two votes, with only Judge Schwebel of the United States dissenting on both, the Court reached a general conclusion by a vote of 15 to 1 that it had jurisdiction to entertain the dispute. Finally, the Court unanimously rejected the U.S. arguments on admissibility and thus declared itself an appropriate forum for Nicaragua's claims against the United States. Vincour, *World Court Acts To Overrule U.S. In Nicaragua Case*, N.Y. Times, Nov. 27, 1984, at 1, col. 6.

Following the decision, U.S. officials commented that the Administration would now be forced to either "defy an order by the World Court and face international opprobrium as a lawless nation, or abandon its policy in Nicaragua . . . ." Taylor, *U.S. Is Now Facing Decision On Court*, N.Y. Times, Nov. 27, 1984, at 6, col. 3. One official predicted "that the United States is going to have to denounce the World Court. It is clearly foreseeable that we're going to lose on the merits, and anybody who doubts that is nuts." *Id.* at col. 5.

On January 18, 1985, the U.S. State Department publicly announced its refusal to submit to adjudication on the merits, by releasing the text of a statement called "*U.S. Withdrawal From the Proceedings Initiated by Nicaragua in the International Court of Justice*." N.Y. Times, Jan. 19, 1985, at 4, col. 1.

93. Memorial of United States, *supra* note 48, at 200.

94. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 415 (Jurisdiction and Admissibility, Judgment of Nov. 26).

> Fourthly, the United States [declaration] of 6 April [1984] is an invalid attempt to modify or vary the existing United States declaration which has been neither validly varied nor terminated and thus remains in force. Fifthly, and alternatively, the [declaration] of 6 April has the effect of terminating the original declaration but . . . on its express terms that termination can only take effect six months after notice.[95]

The United States attempted to distinguish between modifications and terminations and insisted that "notwithstanding the fact that its 1946 Declaration did not expressly reserve a right of modification . . . the 1984 notification effected a valid modification of the 1946 Declaration"[96] because the Court has recognized the existence of a sovereign, inherent, extra-statutory right to modify declarations made under Article 36, at any time until the date of filing of an application, in any manner not inconsistent with the Statute.[97] The United States supported this argument with reference to state practice under both the P.C.I.J. and the I.C.J. that allegedly demonstrated that a declaration is subject to modification before an application is filed, even though the right to do so has not been reserved.

In the early years of the P.C.I.J., most of the signatory states accepted the optional clause for a fixed period, and then renewed the period upon expiration of the original term.[98] Several early acceptances contained no time limits.[99] In 1929, Great Britain and five of the Commonwealth States[100] accepted the Court's jurisdiction "for 10 years and thereafter until such time as notice may be given to terminate the acceptance."[101] In 1939, these declarations became duly terminable on notice and in 1940 South Africa deposited a new declaration explicitly terminable on immediate notice.[102]

This practice is commonplace under the optional clause regime of the I.C.J. Of the forty-seven declarations currently in effect, twenty-two have expressly reserved the right to terminate on notice.[103] Fifteen declarations have reserved a right to modify

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95. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169, 179 (Provisional Measures Order of May 10).

96. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 415 (Jurisdiction and Admissibility, Judgment of Nov. 26).

97. *Id.* at 415–16. Professor Herbert W. Briggs traces the fallatial U.S. argument that the condition of reciprocity applies to the time limits which states insert in their declarations to Sir Humphrey Waldock, "from which dissenting judges freely quote in the current case." Briggs, *supra* note 53, at 377 n.5.

98. Practice under the P.C.I.J. is described in Waldock, *supra* note 27, at 268–69; *see* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 500 (Jurisdiction and Admissibility, Judgment of Nov. 26). (Oda, J., Sep. Opin.).

99. *See, e.g.*, Portugal (1921), Salvador (1921), Costa Rica (1921), Liberia (1921), Bulgaria (1921), Haiti (1921), Panama (1921), Dominican Republic (1924), Guatemala (1926), Nicaragua (1929), Colombia I (1932), Paraguay (1933), Colombia II (1937). 9 P.C.I.J. ANN. R., ser. E, No. 9, at 289–300.

100. 6 P.C.I.J. ANN. R., ser. E, No. 6, at 480–84. Australia, Canada, New Zealand, India and South Africa.

101. 6 P.C.I.J. ANN. R., ser. E, No. 6, at 479. Great Britain introduced the concept of immediate terminability with a declaration which read in part as follows: "I accept as compulsory . . . the jurisdiction of the Court . . . for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance . . . ."

102. 16 P.C.I.J. ANN. R., ser. E, No. 16, at 326.

103. Australia, Austria, Barbados, Belgium, Canada, Democratic Kampuchea, Gambia, India, Israel, Japan, Kenya, Liberia, Malta, Mauritius, Pakistan, Philippines, Portugal, Somalia, Sudan, Swaziland, Togo, and United Kingdom. Of the 22 declarations with immediate rights of termination, 10 also have reserved rights of immediate alteration. 1982–1983 I.C.J.Y.B. 59–92 (1983).

with immediate effect.[104] These durational conditions often have been invoked to terminate existing declarations and substitute amended versions that are narrower in scope.[105] State practice likewise reflects the tendency of states to alter the scope of their consent with the singular "intention of avoiding adjudication of matters that came within the scope of the previous declaration and, in several cases, of avoiding the filing of an application in a particular pending dispute."[106]

The most persuasive argument in support of the contention that declarations are inherently modifiable at will points for support to the acts of certain states which altered or amended their declarations in the absence of a reserved right to do so. There have been five such occasions.

In 1936, Colombia modified its 1932 declaration, which did not contain a reservation of a right to terminate or modify its terms.[107] No objections were provoked when Colombia filed a new declaration in 1937 incorporating the modification excluding matters arising prior to 1932.[108]

In 1938, Paraguay purported to withdraw its acceptance of the optional clause.[109] Paraguay's 1933 declaration, like Nicaragua's, contained no time limit. Six states objected to Paraguay's denunciation.[110] The Court continued to list Paraguay among

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104. Australia, Botswana, Canada, El Salvador, Kenya, Malawi, Malta, Mauritius, New Zealand (limited), Norway (limited), Portugal, Somalia, Swaziland, Togo, and United Kingdom. This is nearly a third of the declarations now existing. 1981–1982 I.C.J.Y.B. 59–92 (1982). Portugal initiated this trend with a declaration of 1955 containing a condition which read: "The Portugese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification." *Id.* at 86.

105. *See, e.g.*, Australia (Feb. 6, 1954), 1954–1955 I.C.J.Y.B. 189 (1955); Canada (Apr. 7, 1970), 1969–1970 I.C.J.Y.B. 55 (1970); France (July 10, 1959, May 20, 1966), 1958–1959 I.C.J.Y.B. 212 (1959), 1966–1967 I.C.J.Y.B. 52 (1967); India (Sep. 15, 1974) 1974–1975 I.C.J.Y.B. 59 (1975); Philippines (Jan. 18, 1972), 1971–1972 I.C.J.Y.B. 78 (1972); South Africa (Sep. 13, 1955), 1955–1956 I.C.J.Y.B. 198 (1956); United Kingdom (June 2, 1955, Oct. 31, 1955, Apr. 12, 1957, Nov. 26, 1958), 1954–1955 I.C.J.Y.B. 198 (1955), 1955–1956 I.C.J.Y.B. 197 (1956), 1957–1958 I.C.J.Y.B. 211 (1958), 1958–1959 I.C.J.Y.B. 225 (1959); *see* S. ROSENNE, *supra* note 2, at 345–416.

106. Memorial of the United States, *supra* note 48, at 226. For example, Australia narrowed the scope of its acceptance in 1954 to frustrate a possible Japanese application to determine rights to pearl fisheries off the Australian coast. *See* Waldock, *supra* note 27, at 267–68.

107. 13 P.C.I.J. ANN. R., ser. E, No. 13, at 276–77. By a letter dated August 27, 1936, the Secretary-General of the League of Nations, at the request of the Colombian Government, informed the Members of the League of an error in the wording of the text of Colombia's declaration accepting the Optional Clause. Consequently, the following reservation was added to the original declaration of January 6, 1932:

In accordance with Article 2 of law No. 38 of 1930, authorizing the President of the Republic to accept the compulsory jurisdiction of the Court as provided in Article 36 of its Statute, this declaration is made with a reservation concerning disputes prior to January 6th, 1932, the date on which it was signed.

Id.

108. 1982–1983 I.C.J.Y.B. 61 (1983).

109. 14 P.C.I.J. ANN. R., ser. E, No. 14, at 57.

110. Bolivia, Belgium, Brazil, Sweden, Czechoslovakia, Netherlands. 15 P.C.I.J. ANN. R., ser. E, No. 15, at 227 (1938–39). None of the six states protesting the legal ramifications of Paraguay's cancellation clearly stated their reasons, "but two of them, the Netherlands and Czechoslovakia, did indicate that they regarded the questions as being governed by the law relating to the termination of treaties." R.P. ANAND, *supra* note 5, at 177.

the states accepting its jurisdiction until the 1959-60 *Yearbook*. Similar scenarios have involved France and the Commonwealth States,[111] El Salvador,[112] and Israel.[113]

The United States argument concluded that, in light of state practice, "it would be unfair to hold a state to its self-chosen words."[114] Nicaragua reasserted the view taken by numerous commentators: that the practice of states provides no support for the view that declarations can be terminated or modified at will.[115]

The arguments of both parties explicitly acknowledge the rule in the *Nottebohm* case[116] that categorically precludes a modification or termination from affecting the jurisdiction of the Court *after* the Court has been validly seised of a case.[117] In consequence of this rule of law, no government may effectively terminate its declaration in whole or in part after the moment of seisin, in any way that purports to divest the Court of jurisdiction.[118]

The United States argument in the present case relied primarily on a state's inherent right to modify a declaration in a manner contrary to the terms contained in the document, *prior to* the filing of an application. The Court was thereby confronted with a matter *prima impressionis*[119] in that the 1984 letter of notification which contradicted the terms of the United States 1946 declaration was received by the United Nations Secretariat "only hours before seisin and in direct contemplation of the particular case of which the Court is seised."[120] What the United States argument studiously avoids, and what the Court clearly points out, is that a mutual obligation, sui generis in nature, does in fact arise upon the filing of a declaration.[121] This obligation is governed by principles of integrity and good faith drawn by analogy from the law of treaties.[122] The reasons for the Court's rejection of the United States

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111. In 1939, France, United Kingdom and five Commonwealth States amended their unexpired declarations to exclude disputes arising out of World War II. *See* 20 LEAGUE OF NATIONS O.J., 407–10 (1939). Eleven states objected. 16 P.C.I.J. ANN. R., ser. E, No. 16, at 333–43.

112. In 1973, El Salvador replaced its 1930 declaration, which provided no fixed time limits, because of perceived fundamental changes in existing circumstances. 1981–1982 I.C.J.Y.B. 66 (1982). Honduras entered an objection challenging El Salvador's right to denounce, modify, or broaden a declaration not expressly reserving a right to do so in the original declaration. Honduras referred to the objections entered in 1938 when Paraguay sought to revoke unilaterally, and argued that condoning such practice would mean accepting the notion that a State unilaterally could terminate its obligation to submit to the jurisdiction of the Court whenever that suits its interests, thus denying other States the right to summon it before the Court to seek a settlement of disputes to which they are parties. This could very well undermine the universally applicable principle of respect for treaties and for the principles of international law.
S. ROSENNE, *supra* note 2, at 363.

113. In 1984, Israel made two modifications to its 1956 declaration, which was terminable on notice but contained no provision for modification. 1982–1983 I.C.J.Y.B. 69–70 (1983).

114. Briggs, *supra* note 53, at 377.

115. Memorial of Nicaragua, *supra* note 7, at 69 (citing with approval M.O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920–1942 476 (1943); 2 L. OPPENHEIM, INTERNATIONAL LAW 61 (7th ed. 1952); I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION 164–67 (1965); Merrills, *The Optional Clause Today*, 50 BRIT. Y.B. INT'L L. 87, 94–96 (1979); Waldock, *supra* note 27, at 263–65).

116. Nottebohm (Liechtenstein v. Guat.), 1953 I.C.J. 111 (Preliminary Objection, Judgment of Nov. 18).

117. *Id.* at 122.

118. Right of Passage over Indian Territory (Port. v. India), 1957 I.C.J. 125, 142 (Preliminary Objections, Judgment of Nov. 26).

119. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 546–47 (Jurisdiction and Admissibility, Judgment of Nov. 26) (Jennings, J., Sep. Opin.).

120. *Id.* at 547 (Jennings, J., Sep. Opin.).

121. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 417–18 (Jurisdiction and Admissibility, Judgment of Nov. 26).

122. *Id.* at 418–19; *see infra* text accompanying notes 145–49.

position are considered in the following sections. This Note then examines reciprocity as a vehicle for altering the scope of a unilaterally fashioned term of adherence to the optional clause.

B. *The Binding Character of Declarations*

In discussing the nature of the obligations created by optional clause declarations, the International Court of Justice confronted two issues: the relevance of distinguishing between express reservations of the power to modify or terminate and time-limits; and whether the principles of the law of treaties govern consensual legal relationships.

Concerning the first issue, the Court summarily established as irrelevant the attempt to categorize the 1984 notification as a "modification" or a "termination" of the 1946 declaration.[123] Although the possible distinction had been discussed in earlier cases,[124] the Court was unconcerned with the characterization of the substantive change attempted by the United States April 6, 1984, notification. The Court focused instead on the procedural correctness of the United States attempt to alter the scope of its obligations *with immediate effect.*

> The truth is that it is intended to secure a partial and temporary termination, namely to exempt, with immediate effect, the United States from the obligation to subject itself to the Court's jurisdiction with regard to any application concerning disputes with Central American States, and disputes arising out of events in Central America.[125]

The United States was not attempting a specific act of modification or termination in reciprocal reliance on an express reservation of a right to modify contained in the Nicaraguan declaration; the United States instead argued for the applicability of reciprocity to procedural time limits. Because the Court was not forced to determine whether reciprocity applies to substantive reservations of the right to modify, the potential remains for the development of pre-seisin reciprocity.

Discussing the second issue, the rules of interpretation applicable to unilateral commitments under the optional clause, the Court firmly established the binding nature of the obligations that arise upon the filing of a declaration.[126] Because each state's declaration of acceptance is a unilateral act, by such acceptance each state undertakes an obligation to submit to the Court's jurisdiction in relation to every other state undertaking the same obligation.[127]

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123. *Id.* at 417–18. Judge Mosler agreed that the question whether the 1984 notification constituted a modification or a termination was not relevant. *Id.* at 465 (Mosler, J., Sep. Opin.). Judge Jennings observed that "one need not spend much time on the somewhat theoretical question whether the Shultz letter amounts to a modification or a substitution of the 1946 Declaration. The major problems of principle would apply to either." *Id.* at 546 (Jennings, J., Sep. Opin.); *accord id.* at 616–17 (Schwebel, J., Sep. Opin.).

124. Right of Passage over Indian Territory (Port. v. India), 1957 I.C.J. 142–44 (Preliminary Objections, Judgment of Nov. 26). The Court accepted a distinction between modification and termination, noting that a proper modification of a subsisting declaration affords reciprocal benefits to other States in an adjudication.

125. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 417–18 (Jurisdiction and Admissibility, Judgment of Nov. 26).

126. *Id.*

127. *Id.*

> [T]he interlocking declarations generate obligations which do not have a treaty character as such, but constitute, nonetheless, obligations of a 'bilateral' or consensual character governed by international law and subject to . . . general principles of treaty interpretation . . . .
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> . . . .
>
> . . . though with some necessary modification in light of the unilateral nature of the individual instruments.[128]

Thus, although declarations are unilateral in form, they give rise to mutual rights and obligations.[129] The majority characterized the optional clause system as a "network of engagements"[130] and declared that:

> [T]he unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and contents of its solemn commitments as it pleases . . . .
>
> . . . .
>
> In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction.[131]

The Court flatly rejected the United States contention that declarations are inherently modifiable prior to the date an application is filed.[132] The Court then turned to the principles of interpretation it found applicable to declarations. The parties conceded and the Court affirmed that declarations, being formal statements of intention, could not be strictly categorized as treaties or contracts. Thus, the Court applied only some of the general rules used to interpret such matters: intent of the declarant and good faith.

Observing that a state's consent to adjudicate forms the foundation of the optional clause system, the Court reiterated the importance of interpreting an individual declaration by first seeking evidence of the intention of the declarant at the time of making the declaration.[133]

> It is well recognized that declarations made by way of unilateral acts . . . may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should

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128. Memorial of Nicaragua, *supra* note 7, at 59, 63; *see* Temple of Preah Vihear (Cambodia v. Thailand), 1961 I.C.J. 17, 32–33 (Preliminary Objections, Judgment of May 26); Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93, 105 (Jurisdiction, Judgment of July 22).

129. The P.C.I.J. discussed the legal nature of optional clause declarations principally in two cases, Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), 1939 P.C.I.J., ser. A/B, No. 77, at 81 (Preliminary Objection, Judgment of Apr. 4) (declarations result in contractual obligations) and Phosphates in Morocco (Italy v. Fr.), 1938 P.C.I.J., ser. A/B, No. 74, at 22 (Preliminary Objection, Judgment of June 14) (declarations are unilateral acts). *See* R.P. ANAND, *supra* note 5, at 142–47; Fachiri, *Repudiation of the Optional Clause*, 20 BRIT. Y.B. INT'L L. 52, 56 (1939).

130. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 418 (Jurisdiction and Admissibility, Judgment of Nov. 26).

131. *Id.*

132. Memorial of United States, *supra* note 48, at 209.

133. The Nicaraguan Memorial urged this approach. Memorial of Nicaragua, *supra* note 7, at 63. Although the Court generally applied the treaty principle of "natural and ordinary" meaning to the interpretation of the Iranian declaration in the *Anglo-Iranian Oil Co.* case, (U.K. v. Iran), 1952 I.C.J. 93, 104 (Judgment of July 22), the Court "seems to have felt that the voluntary and unilateral character of these declarations put them in a special position, in which it was necessary to have particular regard to the known, apparent or probable intentions of the State making the declaration . . . ." Fitzmaurice, *supra* note 17, at 77.

become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.[134]

1. *United States Intent*

Declarations of acceptance of the Court's compulsory jurisdiction are facultative, unilateral engagements, that states are absolutely free to make unconditionally and without limit of time for its duration, or to qualify with reservations or conditions specifying how long the declaration shall remain in force, or what notice, if any, will be required to terminate it.[135] The United States declaration makes no provision for variation or modification but does provide in clear terms for termination on expiration of six months notice of termination.[136] The circumstances under which the United States Senate gave its advice and consent to the 1946 declaration reveal that the United States did not intend to reserve a power of modification or variation. The Report of the Senate Committee on Foreign Relations on the pertinent Senate Resolution described the declaration as:

> [A] unilateral declaration having the force and effect of a treaty as between the United States and each of the other states which accept the same obligations. . . . While the declaration can hardly be considered a treaty in the strict sense of that term, the nature of the obligations assumed by the contracting parties are such that no action less solemn or less formal than that required for treaties should be contemplated.[137]

The Report of the Senate Committee recommending approval of the advice and consent resolution reveals that a scenario similar to that created by the 1984 notification was envisioned by the Committee and specifically provided for:

> The resolution provides that the declaration should remain in force for a period of 5 years and thereafter until 6 months following notice of termination. The declaration might, therefore, remain in force indefinitely. The provision for 6 months' notice of termination after the 5-year period has the effect of a *renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding.*[138]

Two points highlight the bad faith in international obligations and disregard of unilateral commitment implicit in the United States April 6, 1984, notification. First, the text of the notification "implicitly recognizes the incompatibility of the concept of modification with the terms of the United States declaration when it employs the phrase 'notwithstanding the terms of the aforesaid Declaration.'"[139] This clause certainly alludes to the following clause in the 1946 declaration: "This declaration

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134. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 267, 472 (Judgment of Dec. 20), *cited with approval in* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 418 (Jurisdiction and Admissibility, Judgment of Nov. 26).

135. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 418 (Jurisdiction and Admissibility, Judgment of Nov. 26).

136. *See supra* note 3.

137. Report of the Committee on Foreign Relations of the U.S. Senate, S. Doc. No. 259, 79th Cong., 2d Sess. 12 (1946).

138. *Id.* at 7 (emphasis added).

139. Memorial of Nicaragua, *supra* note 7, at 65.

shall remain in force . . . until the expiration of six months after notice may be given to terminate this declaration."[140] Second, it also appears from the April 6 letter that the very purpose of the attempted modification was "to withdraw [the U.S.] obligation in the face of a threatened legal proceeding" and to avoid the possibility that the issues presented in Nicaragua's application be subject to judicial scrutiny.[141]

The April 6, 1984, notification is clearly incompatible with the expression of consent embodied in the United States 1946 declaration. Ironically, the Court adopted policy considerations urged by the United States: that compulsory jurisdiction, being a major obligation, must be based on the clearest manifestation of the state's intent to accept it.[142]

2. *Good Faith in Consensual Legal Relations*

To say that states should be bound by their declarations does not mandate the conclusion that declarations "are subject to specially exacting and restrictive interpretation."[143] As Sir Hersch Lauterpacht says:

> [T]here is a distinct measure of exaggeration in the view that the undertaking of commitments of obligatory judicial settlement implies a one-sided abandonment of sovereign rights. What is true is that the undertaking must be the result of the intention—express or implied—of the parties and that such intention must, and can, be proved in the same way as any other obligation undertaken in a treaty or an instrument equivalent thereto.[144]

In determining the manner and extent to which the United States would be bound to adjudicate, the Court advanced beyond examination of the declarant's own interpretation to consider what other states accepting the same obligation of compulsory jurisdiction may believe regarding the legal situation of the United States. In so doing, the Court upheld the importance of good faith in international relations, derived from the principle of *pacta sunt servanda* in the law of treaties.[145]

By incorporating this modified general principle of treaty interpretation, the Court refrained from granting a purely restrictive interpretation to the unilateral declaration of the United States. Instead of attaching "decisive importance to the meaning given to a unilateral declaration of acceptance by the party making it as distinguished from its legal effect as determined by ordinary methods of interpretation,"[146] the Court adopted "[o]ne of the basic principles governing the creation and performance of legal obligations . . . the principle of good faith . . . ."[147] Consequently, interested states may place confidence in unilateral declarations and are entitled to require that the obligation thus created be respected.

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140. *See supra* note 3.

141. Memorial of Nicaragua, *supra* note 7, at 66.

142. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 411 (Jurisdiction and Admissibility, Judgment of Nov. 26). The United States was not heard to complain when the Court made the identical finding unanimously denouncing Iran's actions in the hostage-crisis case.

143. H. LAUTERPACHT, *supra* note 16, at 339.

144. *Id.* at 338–39.

145. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268, 473 (Judgment of Dec. 20).

146. H. LAUTERPACHT, *supra* note 16, at 344.

147. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268, 473 (Judgment of Dec. 20).

The majority[148] successfully averted further erosion in the integrity and credibility afforded to unilaterally assumed international obligations. By attaching a binding legal character to the obligations of declarant states vis-a-vis each other, the Court agrees with commentators Waldock and Lauterpacht that

> The Optional Clause of Article 36(2) of the Statute is actually and potentially the most important source of the jurisdiction of the Court and caution would seem to be indicated lest it be reduced to a purely unilateral undertaking which is subject to a restrictive interpretation divorced from the generally accepted canons of construction.[149]

IV. Reciprocity and Temporal Limitations

Having denied the existence of an inherent right to modify declarations in any manner and at any time prior to the filing of an application, the Court considered the interrelationship between unilaterally appended time limits and the doctrine of reciprocity. The issue was not simply whether a declaration is subject to modification *before* an application is filed. Rather, the question was whether reciprocity enables states to modify the scope of their acceptance *prior to* the filing of an application, in a manner *inconsistent* with the terms of their own declaration, by relying on the terms of a *potential* adversary's declaration. The United States argued that Nicaragua was not a "state accepting the same obligation," in an attempt to invoke the "novel application to relations even before seisin of the principle of reciprocity."[150]

The United States relied on two underlying premises. First, Nicaragua's unconditional declaration was indefinite in duration, as opposed to unlimited.[151] Second, because the United States accepted a less flexible obligation, it could therefore invoke Nicaragua's purported right to immediate termination pursuant to the doctrine of reciprocity. In the oral hearings on provisional measures the Deputy Agent of the United States expressed the argument in these words:

> Under the principle of reciprocity, the United States could only be bound by its six-month notice proviso in relation to Nicaragua if Nicaragua had a similar or greater notice period in its declaration. . . . Nicaragua's declaration . . . is wider *ratione materiae*, but narrower *ratione temporis*, than the United States declaration. As the State making the wider temporal acceptance of the Court's jurisdiction, the United States was therefore also entitled to rely on Nicaragua's purported declaration to modify its own declaration with immediate effect.[152]

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148. Every one of the Court's judges except the American judge, Schwebel, found some basis for jurisdiction. "Among them were distinguished jurists from Britain, West Germany, France, Italy, Japan, Brazil and Argentina, none of whom can by any stretch of the imagination be regarded as politically biased against [the U.S.]." Gardner, *It Was Wrong to Duck the World Court*, Wall St. J., Feb. 22, 1985, at 26, cols. 4–5.

149. H. Lauterpacht, *supra* note 16, at 346.

150. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 548 (Jurisdiction and Admissibility, Judgment of Nov. 26) (Jennings, J., Sep. Opin.).

151. The U.S. alleges that an "indefinite" unilateral commitment may be terminated *immediately*, as opposed to one which is subject to a fixed period of validity and then either becomes immediately terminable or remains subject to a notice period for termination (as did the U.S. declaration). Under this definition, the U.S. declaration of 1946 became "indefinite" in 1951 subject to the six-month notice period. The declaration of Nicaragua, which contains no time limit, is likewise termed "indefinite," subject to no period of notice.

152. CR 84/10, pp. 71–72.

According to the United States contention, the principle of mutuality and equality of states before the Court permitted the United States to exercise the reciprocal right of termination with immediate effect implicitly enjoyed by Nicaragua even before Nicaragua filed its application.[153]

Nicaragua refuted both arguments, asserting primarily that reciprocity simply does not apply to time limits set by states for the duration and termination of their declarations.[154] Nigaragua claimed secondly that even if reciprocal rights attached to the procedural terms and formal conditions of consensual legal obligations, the United States in this case was left with the *narrower* acceptance, because Nicaragua's unconditional declaration remains in force in perpetuity.[155] In a clear affirmation of the former argument, the Court found Nicaragua to be a state "accepting the same obligation" for purposes of Article 36, paragraph 2, and entitled to rely on the integral six month notice proviso. The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a state's own declaration, whatever its scope, limitations or conditions.[156]

In resolving these conflicting conceptual interpretations, the Court made several bold and clarifying advances regarding the interpretation of declarations and simultaneously laid the groundwork for potentially troubling future developments in the application of reciprocity to temporal limitations.

A. *Two Kinds of Time Limits*

The Court made a clarifying distinction between the substantive limitations and conditions on the scope of a state's acceptance of jurisdiction as contained in the reservations, and those portions of declarations which comprise the structure of the instrument itself.[157] The former fall within the purview of the reciprocity doctrine, whereas it is now affirmed that reciprocity cannot be invoked to excuse departure from the formal, procedural conditions of duration and extinction which form an integral part of the instrument of acceptance.[158] Regardless of the possible interpretations of the terminability of an unconditional declaration, the Court ruled that the United States could not invoke reciprocity as the basis for its 1984 notification, which

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153. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 416–17 (Jurisdiction and Admissibility, Judgment of Nov. 26).

154. Memorial of Nicaragua, *supra* note 7, at 77.

155. *Id.* at 75.

156. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 419 (Jurisdiction and Admissibility, Judgment of Nov. 26).

> The regime of reciprocity is maintained, however, since any substantive reservations introduced by [a State] in the exercise of its reserved right to vary could be taken advantage of in the ordinary way by the other State. It is the substantive content of the declaration at any particular time that is the subject of the regime of reciprocity, and not the right to vary itself.

Memorial of Nicaragua, *supra* note 7, at 78.

157. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 419 (Jurisdiction and Admissibility, Judgment of Nov. 26).

158. *Id.*

purported to modify the substance of the 1946 declaration.[159] The Court said Nicaragua was entitled to rely on the maintenance in force of the United States declaration for six months after notification of termination, that proviso being a positive undertaking and an integral part of the instrument which contains it.[160]

In its analysis, the Court failed to resolve satisfactorily whether formal conditions reserving a right to modify may, under certain circumstances, come within the operative effect of reciprocity; in so doing, the Court raised a very troubling issue. The problem arises from a failure to denounce categorically the application of reciprocity to *any type* of temporal limitation.

B. *The Interpretation of Unconditional Declarations*

The Court could have concluded its analysis of the legal ineffectiveness of the 1984 notification once it defined the six month notice proviso as an undertaking integral to the United States declaration and outside the scope of reciprocity. At that point it was clear that the United States was not entitled to act in non-application of the 1946 time limit proviso. The Court, however, went on in an attempt to discern the terminability of unconditional declarations.

The United States insisted that because Nicaragua's declaration is silent on the issue of termination, the declaration is indefinite and immediately terminable.[161] Commentators have debated strenuously the right of immediate termination of declarations of indefinite duration.[162]

In support of Nicaragua's position that declarations such as theirs remain forever valid, several scholars have promoted the application of rules of treaty interpretation. McNair[163] and Brierly[164] assert that there is no general right of unilateral termination of a treaty of indefinite duration. According to Articles 42–46 of the Vienna Convention on the Law of Treaties,[165] the termination of a treaty that has no express reservation of a right of denunciation must rest upon some supervening legal title recognized in international law.[166] Anand[167] supports the analogy to treaty law and observes:

> There being no provision in the Statute, it seems reasonable to assume that the abrogation or expiry of the declaration will be subject to the general rules covering termination of treaties. This would normally mean that a State having made a declaration without any provision for its termination would not be entitled to cancel it as against other states having declarations for fixed periods except with their consent. Otherwise, termination . . .

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159. *Id.*

160. *Id.*

161. *Id.* at 419; Memorial of United States, *supra* note 48, at 252.

162. *See* R.P. ANAND, *supra* note 5, at 159–60; I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION 149–50 (1965); Briggs, *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice*, 93 RECUEIL DES COURS 223, 240–42 (1958I); Waldock, *supra* note 27, at 255; Williams, *The Optional Clause*, 11 BRIT. Y.B. INT'L L. 63–84 (1930).

163. A. MCNAIR, THE LAW OF TREATIES 493–505 (1961).

164. D. BRIERLY, LAW OF NATIONS 240 (1949).

165. Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969).

166. Capotorti, *L'Extinction et la suspension des Traités*, 134 RECUEIL DES COURS 427–581 (1971).

167. R.P. ANAND, *supra* note 5, at 177.

> would not be justifiable except by reference to some special rule concerning the termination of treaties . . . .[168]

In opposition, Rosenne cites the "unreality" of applying to the few remaining declarations "an inflexible rule said to derive from the general law of treaties and disallowing the right of unilateral withdrawal."[169]

The Court dealt with this issue cursorily, applying by analogy the good faith principle derived from the law of treaties.[170] The Court interpreted this principle as requiring a *reasonable time* for termination of or withdrawal from treaties containing no provision for the duration of their validity.[171] Having set the standard at a "reasonable time," the Court concluded that even if reciprocity did apply to time limits, the United States failed to properly abide by the durational provisions contained in Nicaragua's declaration.[172] Apparently, the three days from April 6 (date of notification) to April 9, 1984 (date of filing) was not a reasonable time.[173]

The Court entertained a disturbing notion when it considered the possibility that under certain circumstances reciprocity might be relied upon to avoid the unilaterally appended terms of one's own declaration. For example, had Nicaragua's declaration limited the scope of its acceptance by reserving a right of termination with immediate effect, could the United States have invoked that reservation, *prior to* the filing of the application, to avoid both the jurisdiction of the Court and the terms of its own acceptance? The majority sentiment indicated dissatisfaction with such a possibility. In the words of the majority:

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168. *Id.* at 177; *see also* Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT'L L. 51–68 (1974); Briggs, *supra* note 162, at 272–73; M. WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW 410, 425–31, 441 (M. Whiteman ed. 1970).

169. S. ROSENNE, THE TIME FACTOR 27 (1960); I. SHIHATA, *supra* note 162, at 167. Judge Oda similarly felt that "it is quite untenable to argue that those declarations without any reference to duration . . . can never be terminated or amended because of the lack of a clause concerning the period of validity of declarations." Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 510 (Jurisdiction and Admissibility, Judgment of Nov. 26) (Oda, J., Sep. Opin.).

170. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 419–20 (Jurisdiction and Admissibility, Judgment of Nov. 26). Judge Mosler rejected the notion, urged by the United States, of immediate terminability of unconditional declarations and agreed instead with the Court's application by analogy of the treaty principle of good faith. *Id.* at 466–67 (Mosler, J., Sep. Opin.). Judge Oda, on the other hand, rejected the limited analogy to treaty principles of interpretation since the analogy cannot be uniformly applied to other aspects of optional clause declarations. After a thorough examination of history and state practice under the optional clause regime, Oda found Nicaragua's declaration to be terminable on notice. *Id.* at 510 (Oda, J., Sep. Opin.). Judge Jennings found the entire discussion of whether the legal position of declarations is governed by treaty law to be inconclusive.

> The fact of the matter must surely be that the Optional Clause regime is *sui generis*. Doubtless some parts of the law of treaties may be applied by useful analogy; but so may the law governing unilateral declarations; and so . . . may the law deriving from the practice of States in respect of such declarations.

Id. at 546 (Jennings, J., Sep. Opin.); *see also id.* at 620–21 (Schwebel, J., Sep. Opin.) (declarations are unilateral instruments subject to a *sui generis* regime).

171. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 419–20 (Jurisdiction and Admissibility, Judgment of Nov. 26). Judge Mosler concluded that "all legally binding acts . . . can, under certain conditions, be terminated. . . . The questions remain however on what conditions the right of termination may be exercised." *Id.* at 466–67 (Mosler, J., Sep. Opin.). Judges Jennings, Oda, and Schwebel interpreted Nicaragua's unconditional declaration as immediately terminable in light of state practice.

172. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 419–20 (Jurisdiction and Admissibility, Judgment of Nov. 26).

173. *Id.*

> The Court is not convinced that it would be appropriate, or possible, to try to determine whether a State against which proceedings had not yet been instituted could rely on a provision in another State's declaration to terminate or modify its obligations before the Court was seised. . . . [The] jurisprudence [of the Court] supports the view that a determination of the existence of the "same obligation" requires the presence of two parties to a case, and a defined issue between them, which conditions can only be satisfied when proceedings have been instituted.[174]

This issue merits immediate attention in view of the large number of declarations that reserve a right of immediate terminability on notice to the Secretary-General.[175] Under the well-accepted *Nottebohm* rule, once proceedings have been properly instituted the seisin of the Court may not be affected by subsequent changes, amendments, or denunciations of a declaration.[176] Thus, if the Court had denounced categorically pre-seisin reciprocity, the ultimate conclusion would be that no type of temporal reservation could be invoked under the doctrine of reciprocity to effect a substantive alteration of a declaration in a manner inconsistent with the terms of that instrument. Regrettably, the majority did not use this occasion to that end, and four of the separate opinions took the opportunity to expand on the potential future recognition of a right of pre-seisin reciprocity.

This is the view adopted by Judge Mosler[177] who considers temporal limitations of any sort to be substantive reservations for the purpose of reciprocity.

> Reservations restrict the substantive extent of the obligation, time-limits put an end to the obligation, whether made with or without substantive limitations in its entirety. It is difficult to see how the 'same obligation' within the meaning of Article 36, paragraph 2, can continue to exist longer for one State than for its potential counterpart whose declaration is limited by a shorter notice period, or may be terminated by notification at any moment.[178]

A conceptual problem inherent in this reasoning is recognized by all those who advocate it; no state has a right or a need to invoke reciprocity until an application is filed, and at that point the consideration of amending or terminating with respect to the current dispute becomes entirely academic. Therefore, to persist in the argument for full equality of obligation at all times is to sanction pre-seisin reciprocity, a concept which flies in the face of the Court's compulsory jurisdiction.

C. *Pre-Seisin Reciprocity*

Pre-seisin reciprocity challenges the very concept of an effective adjudicative system intent upon promoting peaceful settlement of disputes in the international

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174. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 420 (Jurisdiction and Admissibility, Judgment of Nov. 26).

175. Waldock, *supra* note 27, at 278; *see supra* note 102.

176. Nottebohm (Liechtenstein v. Guat.), 1953 I.C.J. 111, 123 (Preliminary Objection, Judgment of Nov. 18); *see supra* text accompanying notes 56–57, 114–17.

177. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 461 (Jurisdiction and Admissibility, Judgment of Nov. 26) (Mosler, J., Sep. Opin.).

178. *Id.* at 466.

sphere. Such a concept would encourage premature filing of applications, substantive modification of binding commitments vis-a-vis certain states based on the speculation that those states *may* attempt to bring their dispute to Court, anxious withdrawal and apprehensive substitution of severely limited declarations, and overall confusion due to the inability to rely on a single version of a state's commitment binding *erga omnes*.

The separate opinions of Judges Mosler, Oda and Jennings, depend on the circumstances of this particular case for their analysis of the reciprocity issue. Their opinions merit scrutiny in light of the likelihood of a future situation arising under a less restrictive set of facts.

Judge Mosler found Nicaragua's unconditional declaration to be terminable on reasonable notice and on the facts of this case concluded that the United States six-month notice provision simply could not be reduced to three days. Therefore, the United States was not in a position on April 6, 1984, to benefit from reciprocal reliance on the shorter notice period attributed to Nicaragua.[179]

Judge Mosler's opinion supports the inference that had Nicaragua's declaration been explicitly terminable on notice, the United States could have reciprocally relied on that provision to terminate its own obligation, in disregard of the six-month notice provision and *prior to* the filing of an application by Nicaragua.

In that situation, the only way for a state with an immediately terminable declaration to achieve peaceful adjudication on the merits of its claim would be to file without warning and probably prematurely. The possiblity of state *A* effecting substantive changes in its own declaration in avoidance of its terms, in reciprocal reliance on the procedural reservations contained in the declaration of state *B*, exists only until an application has been filed and the Court has become seised of the dispute. State *B* must manage to file an application before the defendant state *A* has made use of *B*'s shorter notice period to effectively terminate or modify the scope of its declaration.[180]

Judge Oda conducted a comprehensive survey of past practice under the optional clause and concluded that a declaration with no fixed period of duration should be interpreted as terminable at any time. Therefore, because the United States has assumed the weightier manner and notice provision, it should be entitled to invoke the doctrine of reciprocity prior to seisin to equalize the commitments of the Applicant and Respondent state.[181] Nicaragua cannot equitably insist upon United States compliance with a burden of inescapability which Nicaragua itself does not bear.[182] Oda stated:

> The reciprocity of the obligation must exist at the date of the seisin of the case, and acceptance of the Court's jurisdiction by the Applicant and the Respondent must be current

179. *Id.*
180. *Id.*
181. *Id.* at 511–12 (Oda, J., Sep. Opin.).
182. *Id.*

> at that date. . . . Thus the United States is fully exempted from the Court's jurisdiction in relation to Nicaragua on the date of Nicaragua's application.[183]

It appears from this statement that Judge Oda was induced to advocate reliance on the doctrine of reciprocity as a means of justifying the alteration of a state's consensual commitments prior to seisin in disregard of their own structural reservations.

Judge Jennings viewed state practice as establishing an unmistakable trend in the attitudes and expectations of states within the optional clause system. Jennings concluded that states now "have the right, before seisin of the Court, to withdraw or alter their declarations of acceptance, with immediate effect, and, moreover, even in anticipation of a particular case or class of cases."[184]

Thus, pre-seisin reciprocity is advanced as a superfluous justification for the result urged by the United States. Even if a period of notice of termination were imputed to Nicaragua's declaration, Jennings suggested that *notice with immediate effect is, in fact, reasonable notice.*[185]

Judge Schwebel found temporal conditions to be within the reach of reciprocity on four grounds. Initially, he viewed temporal conditions as no less integral to the concepts of mutuality and sovereignty of states before the Court than are substantive reservations.[186] Secondly, he found no definitive statements by the Court precluding such an application of reciprocity. Perhaps this finding is not surprising since never before has a state attempted to avoid the "revision" terms of its own declaration in stated reliance on the "revision" terms contained in the declaration of another state. Thirdly, Schwebel argued that the United States intended, at the time the 1946 declaration was drafted, that the safeguard of reciprocity would apply to temporal reservations.[187] Last, he asserted that a contrary result may produce inequality and inequity.[188] To the contrary, if the practice of states in disregard of their commitments has truly become an established and accepted right, and if the trend among declarant states has been to condition their declarations on a right of immediate termination, surely the United States has had ample opportunity in the past thirty-nine years to incorporate such a right into the 1946 declaration, in the manner prescribed therein.

None of the Judges advocating pre-seisin reciprocity deny the complexity and confusion such a concept would infuse into the optional clause system. Judge Mosler acknowledges the "disadvantages" that would result from the relative effect of declarations in a regime which sanctions complete reciprocity; however, he does not foresee greater complications than currently exist with respect to substantive reservations.[189]

Judge Schwebel expanded on the foreseeable chaos when he acknowledged that taking such a

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183. *Id.*
184. *Id.* at 553 (Jennings, J., Sep. Opin.).
185. *Id.*
186. *Id.* at 624 (Schwebel, J., Sep. Opin.).
187. *Id.* at 626.
188. *Id.*
189. *Id.* at 466 (Mosler, J., Sep. Opin.).

> broad view of reciprocity, which would not give effect to the 1984 notification of the United States *erga omnes*, but would regard the United States as having been empowered reciprocally and immediately to terminate its declaration vis-a-vis Nicaragua, involves a construction of reciprocity which, being applied before a case is filed in the Court, gives rise to complications.[190]

Judge Oda does not attempt to minimize the negative implications of his analysis, which he views in terms of the optimistic, unrealistic goals embodied in the optional clause system.[191] Unfortunately, Oda's sentiments purport recognition of "the reality of the international community—where a lack of confidence in international law still prevails and the law enforcement machinery is still non-existent . . . ."[192]

By far the most disheartening is the opinion of Judge Jennings who, like Judge Oda, bases his favorable evaluation of pre-seisin reciprocity on state practice and harshly concludes:

> [A]ttractive as the device of reciprocity might be for solving this problem, the fact is that the practice of States . . . has already gone beyond it. . . . States belonging to the Optional Clause system have now generally the expectation that they can lawfully withdraw or alter their declarations of acceptance at will, provided only that this is done before seisin.[193]

This Note does not argue that the substance of the reservations sought to be appended to the United States declaration via the 1984 notification are impermissible or even that the United States had no right to attempt modification in the face of threatened legal proceedings. This Note's rejection of pre-seisin reciprocity and the denunciation of an inherent right to modify at any time prior to seisin represents an expectation that integrity and good faith should be inseparable from the unilateral obligations undertaken by any sovereign state.

V. CONCLUSION

Because no substantive changes in the scope of a declaration will affect the seisin of the Court *after* an application has been filed, the only time one state's broader right to modify its obligation is a valid concern is prior to the moment of seisin. However, the reciprocal right to equalize the scope of the obligation accepted in relation to a given dispute arises *only* when an application has been filed. Prior to the filing of an application, a state is bound to the integral terms of its own instrument of acceptance.

The binding character of declarations arises from the principle of good faith in international relations and is defined by the intent of the declarant state at the time the declaration was filed. A government can limit its internal liability by terminating its acceptance of the Court's compulsory jurisdiction or by adding a reservation in accordance with the manner and notice provisions it has prescribed for itself.

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190. *Id.* at 627 (Schwebel, J., Sep. Opin.).
191. *Id.* at 512 (Oda, J., Sep. Opin.).
192. *Id.*
193. *Id.* at 550 (Jennings, J., Sep. Opin.).

However, if by design or inadvertence a state fails to do so, it cannot then seek to rely on the procedural devices incorporated in another state's declaration.[194] Yet, several judges have argued that as a matter of political reality, acceptance of compulsory jurisdiction may depend upon the freedom afforded the sovereign subjects of international law to limit the scope of their acceptance. This view has led judges and commentators to promote the concept of pre-seisin reciprocity.

The concept of pre-seisin reciprocity was held to be inoperative under the unusual facts of the *Nicaragua v. United States* case, but a more amenable fact pattern is not difficult to foresee. Once condoned, pre-seisin reciprocity will induce states to guess the identity of a potential opponent and to invoke the terms of that state's declaration (if necessary) to make substantive changes in their own acceptance. Such changes would only be effective vis-a-vis the state whose terms were utilized to effect the revisions. After several such revisions in the scope and substance of one state's commitment, the level of uncertainty would be so high within the optional clause system that no state could be relied upon to wade through the tangle of declarations to arrive at a clear analysis of its own right to institute peaceful adjudication.

Possibly, fewer states will be tempted to adhere to the Court's compulsory jurisdiction in light of a decision upholding the integrity of unilateral obligations and refusing to legitimize state practice which evidences blatant disregard for organized international justice.[195] Current adherents might now be induced to make their declarations immediately terminable.[196] However, to judicially endorse pre-seisin reciprocity is to reduce optional clause jurisdiction to a system so malleable as to permit states complete freedom to determine their adherence to international law on a case by case basis, in which case the Court might as well end the pretense of a compulsory jurisdiction system and hold itself out merely as a forum for negotiations between currently amenable parties.[197]

Ilene R. Cohn

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194. Gardner, *supra* note 148.

195. Some have urged the United States to reconsider its acceptance of the Court's compulsory jurisdiction. Former State Department legal advisor John R. Stevenson feels that this case "will be viewed by many as a highly technical and inequitable expansion of the Court's jurisdiction against the expressly stated wishes of the defendant . . . and will result in less rather than more use of the Court." Stevenson, *On World Court's Compulsory Jurisdiction Over U.S.*, N.Y. Times, Feb. 9, 1985, at 16, col. 3.

196. In his separate opinion, Judge Oda stated that:

> [T]he present Judgment will inevitably induce declarant States to terminate their declarations or at least drop from them any advance notice clause, so as to avoid having to answer any case unilaterally brought by other States, which themselves can take advantage of withdrawing at any time from their obligations under the Court's jurisdiction. This would vastly diminish the importance of the Optional Clause.

Military and Paramilitary in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 513 (Jurisdiction and Admissibility, Judgment of Nov. 26) (Oda, J., Sep. Opin.).

197. In accordance with the instructions of the President, on October 7, the Secretary of State deposited with the Secretary-General of the United Nations formal notice of termination of the United States declaration, deposited on August 26, 1946, accepting the optional compulsory jurisdiction of the International Court of Justice. This action will become effective six months after the deposit of that notice.

Statement by The Deputy Spokesman for the Department of State on the United States Decision on the International Court of Justice.

See U.S. Plans to Quit the World Court in Political Cases, N.Y. Times, Oct. 7, 1985, at A1, col. 6.